IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE JURISDICTION

CRIMINAL APPEAL NO.517 OF 1998

Zarin Abdul Rahim Chandrekar ...Appellant
Vs.
The State of Maharashtra & Ors. ...Respondents

CRIMINAL APPEAL NO.709 OF 1998

1.Mohammed Harun Mohammed Nazir Anasari
2.Samir Ismail Mulla ...Appellants

Vs.

The State of Maharastra ...Respondent

Mr.S.V.Marwadi Adv. for Appellants.
Mrs. P.H.Kantharia, A.P.P. for Respondents

CORAM: V.G. PALSHIKAR &
ANOOP V. MOHTA, JJ.
DATED: 3RD NOVEMBER, 2004.

JUDGMENT (PER ANOOP V. MOHTA,J.)

1. These are two appeals filed by the appellants/accused nos.1,2 and 3 against the common judgment and order dated 30th April, 1998 passed by the Additional Sessions Judge, Thane, where by all the accused have been convicted under Section 302 r.w. 34 of Indian Penal Code (I.P.C.) and sentenced to suffer life imprisonment.

. **F A C T S :-**

(a). The appellant/accused no.1, the wife of the deceased Abdul Raheem (herein after referred to as the deceased) along with the appellant no.2, a builder, her paramour and accused no.3, a friend of accused no.2, hatched a conspiracy and with a common intention by using incriminating weapons, committed the murder of the deceased, during the night of 26th July, 1995. Appellant/accused no.1, as per prosecution, has illicit relation with appellant/ accused no.2. Appellant/accused no.1 has a reputation of the bad character and therefore, the deceased used to change houses to avoid frequent visitors in his absence at his house, but in vain. There used to be frequent quarrels between appellant/accused no.1 and deceased because of this. All the accused therefore, had planned to murder the deceased. Accused nos. 2 and 3 had purchased weapons like crowbars from p.w. 4 and p.w.14 and two knives from p.w. 15.

(b). On 26th July, 1995 after dinner, the deceased slept in his bed room. On 27th July, 1995 at about 2.30 a.m. at Room no.301, Rai Anis Gardens, Rasheed Compound, Mumbra, appellant/accused no.2 and accused no.3 entered into the house with the help of appellant/accused no.1 and assaulted the deceased with crowbars and knives. The elder son of the appellant/accused no.1 and deceased, Mohammed Shaikh (p.w.2) aged 11 years, had witnessed the assaults. On noticing this accused nos.2 and 3 tried to hide

themselves in the bathroom and in the kitchen, respectively. Appellant/accused no.1 came out of the room and took Mohammed to the next bedroom. When enquired the appellant/accused no.1 asked him to keep silence, otherwise accused nos.2 and 3 would beat him also, as they were beating the brother-in-law of accused no.2. Appellant/accused no.1, after sometime went out of the room and latched it from the outside, as Mohammed was fast asleep. As per the prosecution case, all these accused, there after, kept the body of the deceased in the box of the cot and had cleaned the place of occurrence, but still the blood stains remained on the wall and electricity board of the room.

(c). On 27th July, 1995, Mohammed got up and knocked the door of the room which was closed and latched from outside. Appellant/accused no.1 had opened the door and asked him to keep mum, on enquiry about the father. Thereafter, appellants/accused nos.1 and 2 and Mohammed went to Ambernath by hiring Maruti van and returned to Mumbra at about 11.30 a.m. on the same day. Appellant/accused no.2 had purchased 13 feet plastic sheets, one gunny bag and one fish acquerium. On 27th July, 1995, after dinner, all the accused and Mohammed slept in the same house. As alleged, between the night of 27th July, 1995 and early morning of 28th July, 1995 the dead body of the deceased was removed and later on thrown in the ditch

near Vijay Paultry farm. The plastic sheet and gunny bag were hidden in the premises near Gaondevi temple, Diva. On 28th July, 1995 people from locality had noticed the dead body near Vijay Paultry. Appellant/accused no.1 had identified the dead body and immediately made phone call at about 11.00 a.m. to p.w. 9 Mohammed Farooq, a friend of deceased. The complainant/appellant/accused no.1, there after had lodged a complaint in the Mumbra police station before Bhikaji, P.S.I.(p.w.25) and also confessed a crime and reported the facts up to the recovery of the dead body (Exh-84). The criminal case was registered accordingly.

(d). P.W.25 P.S.I. thereafter, visited the spot and drawn the inquest panchanama. The spot panchanama of the house of the deceased was also drawn (p.w. 29, Exh-63). At the instance of appellant/accused no.2 blood stained clothes and two pieces of crow bars were also recovered (Exh-58). On 30th July, 1995 at the instance of accused no.3 blood stained mattress and choppers were also recovered in presence of P.W.29. The blood stained gunny bag and plastic sheets were also recovered. The blood stained clothes of the accused and the deceased were also seized and sent for the Chemical Analyser’s report (Exh-133 to 136).

(e). As per the prosecution case, the appellant/accused no.1 had written a confession letter

in Urdu to P.W.8 Mohammed Sameer Gulam, younger brother of the deceased and expressed her repentance about the said incident.

(f). P.W.6 Dr. Anil Sawant examined and submitted post mortem report Exh-37 dated 28th July, 1995. The time of the death as per the medical opinion varies from 36 to 72 hours, prior to the post mortem report dated 28th July, 1995. Appellant/accused no.3 was chargesheeted under the Arms Act, 1925 after due sanction from the competent authority. All the accused were chargesheeted. They denied the charges and pleaded not guilty.

2. Heard the parties. Perused the whole record including all the testimonies of the 32 prosecution witnesses. No evidence was lead by the accused. All those 32 witnesses and its importance can be set out as under.

3. Hasan S/o.Rajiman Shaikh as p.w.No.1, vide at Exh.24 who is a panch witness to the memorandum statement of accused no.3: Mohammed Musahib S/o. Abdul Rahim as p.w.no.2 vide at Exh.29 who is a son of deceased Abdul Rahim and accused no.1 and who is an alleged eye-witness to the incident: Kokila S/o. Pravin Patel as p.w. no.3 vide at Exh.31 who is panch witness to the arrest of all accused persons : Kantilal S/o. Mangilal Jain as p.w. no.4 vide at

Exh.33 from whom accused no.2 had on 26.7.95 purchased crow-bar, Babulal S/o. Pukharaj Parekh, p.w. 5 vide at Exh.35 from whom accused no.2 had purchased plastic sheet on 27.7.95; Dr. Anil S/o. Sakharam Sawant as p.w. no.6 vide at Exh.No.36 who had performed autopsy on the dead body of deceased Abdul Rahim; Sayyad Khalid S/o. Sayyed Yasin as p.w. no.7 vide at Exh.38 who is the proprietor of STD centre and panch witness to the panchanama of seizure of STD register; Mohammad Samir S/o. Gulam Mustafa as p.w. no.8 vide at Exh. 44 who is the brother of deceased Abdul Rahim Mohammad Farooq S/o. Abdul Ansari as p.w.no.9 vide at Exh.45 who is the friend of deceased Abdul Rahim and who had made reconciliations between accused no.1 and deceased Abdul Rahim; Ijaj Ahmed s/o. Rafia Ahmad Ansari as p.w. no.10, vide at Exh.46, who was witness to the illicit relationship of accused no.1 and 2 Aayaz Ahamad Ansari as p.w. no.11 vide at Exh.47 who was the servant of deceased Abdul Rahim; Abdul S/o. Gani Shaikh as p.w. no.12 vide at Exh.51 who is panch witness to the panchanama of scene of offence; Khurshid Alam S/o. Shaikh Habibulla as p.w. no.13 who was the landlord of deceased Abdul Rahim and accused no.1 vide at Exh.52 Kishan S/o. Babu Salunkhe as p.w. no.14 vide at Exh.54 who is black-smith and who had done two pieces of crow-bar on the say of accused no.2 Mohammed Shaffi Ansari as p.w. no.15 vide at Exh.55 from whom accused no.2 had taken knives; Hussain Mohammad Tole as p.w. no.16, vide at

Exh.56 who is panch witness to the memorandum of statements of both accused nos.2 and 3 and panch witness to the seizure panchanama of blood-stained clothes of accused no.2 and blood-stained mattress and weapons; Reshama W/o. Iqbal Khan as p.w. no.17 vide at Exh.60; who is an alleged eye witness to the incident; Anwar S/o. Ahamad Patel as p.w. no.18 vide at Exh.62 who is panch witness to the panchanama of place of incident; Dilip s/o.Rajiv Chavan as p.w. no.19 vide at Exh.69 who was in company of accused nos.2 and 3 on the night of incident for consuming alcohol and before whom accused no.2 had disclosed his detention to commit murder of one persons; Ijaj Ahamad S/o. Gani Ahamad Khan as p.w. no.20 vide at Exh.72 in whose vehicle accused no.1 and accused no.2 and son of accused no.1 had gone for outing on 27.7.1995 towards Ambernath; Ramesh s/o. Ramdas Mahale as p.w. no.21 vide at Exh.74 who is panch witness to the panchanama of seizure of letter Exh.109; Hiraji S/o. Narayan Patel as p.w. no.22 vide Exh.76 from whose shop accused no.2 had purchased gunny bag on 27.7.1995; Mohammad Yusuf S/o. Kasam Akbar Shaikh as p.w. no.23 vide at Exh.77 in whose presence accused no.1 had made telephonic call to Bhiwandi and Nasik on 28.7.1995; Manik S/o. Bandeppa Gundewar as p.w.no.24 vide at exh.81 who is panch witness to the memorandum statements of accused persons nos.2 and 3 and panch to the seizure panchanama of blood-stained mattress made on the

disclosure statements of accused nos.2 and 3; Bhikaji S/o. Shahaji Pandare P.S.I. as p.w. no.25 vide at Exh.83 who had recorded the oral report of accused no.1 about the occurrence of incident; Firoze S/o. Isak Shaikh as p.w. no.26 vide at Exh.no.89 who had carried the examination of documents; Mohammad Suleman S/o. Aji Shaikh Kalimuddin Qureshi as p.w. no.27 vide at Exh.108 translator of Urdu letter (Exh.109); Abdulla s/o. Hussain Patel as p.w. no.28 vide at Exh.111 who is panch witness to the specimen handwriting of accused no.1; Bharat s/o. Nivrutti Nimbalkar PI as p.w. no.29 vide at Exh.113 who an Investigating Officer; Vittal S/o. Vishwanath Harihar as p.w. no.30 vide at Exh.122 who had obtained specimen handwriting of accused no.1; Vijay s/o. Murlidhar Daange as p.w. no.31 vide at Exh.123 who had prepared the map of place of incident; Prabhakar s/o. Tukaram Lohar, Commissioner of Police as p.w. no.32 vide at Exh.129 who had issued sanction to launch prosecution against accused no.3 under Arms Act.

. **R E A S O N I N G S ;**

3. There is no much controversy about the homicidal death of the deceased. P.w. 6 Dr. Anil Sawant, as after due examination of the dead body submitted his post-mortem report (Exh.37) had noticed various sever injuries, internal and external,

inflicted by the weapons in question and that resulted the death of the deceased. All the injuries were antemortem. The cause of death was due to multiple fractures of skull bones with laceration of brain. He has also opined that such injuries were possible with the crowbars Articles 17 and 18. The probable time as per this witness, of the death might be between 36 to 72 hours prior to the post mortem examination. On 28.7.1995 the post mortem examination was performed between 5.00 p.m. to 6.00 p.m.

4. The main witness in the present case is p.w. no.2 Mohammed Musahib, 13 years son of the deceased and appellant/accused no.1. Based on testimony of this witness, the learned Sessions Judge has convicted all the accused. There was no much challenge to the fact that Mohammed knows all the accused. He has deposed that on 26.7.1995 at about 2 p.m., he saw accused no.3 and his mother appellant/accused no.1 in the house. At about 4 p.m. they had tea i.e. accused no.1, 3 and Mohammed Musahib. At about 6.45 p.m., one Sameer, Haroon, his brother Mubaris and one Nilofer had dinner. This witness has described the flat consisting of two bed rooms, one hall, kitchen and latrine the place of in which fish tank was kept. He has deposed that after dinner he slept with his brother in the bedroom which was by the side of the kitchen. At that time Haroon, Sameer and his mother were chit-chating. He has deposed the incident in the

following words.

Question No.48:-In which bedroom fish tank is kept ?
Answer: It is in the bedroom by the side of kitchen.

Question No.49:-What is in between kitchen and opposite bedroom ?
Answer: There is a passage.

Question No.50:-Where is gallery?
Answer: Gallery is by the side of hall

Question No.51:-What did you do after you took dinner?
Answer: I myself and my brother slept in the bedroom which is by the side of kitchen.

Question No.52:-What Nilofar, Harden, mother and Amir did thereafter?
Answer: Nilofar left our house and Harden. Amir and mother were chitchatting.

Question No.53:-What happened thereafter ?
Answer: In the night I heard hue and cry raised by my father-‘Save me, Save me’.

Question No.54:-What did you see ?
Answer: I saw Harun and Samir were beating my father and my-mother was with them. At that time Harden and Amir were carrying steel bars in their hands by which

digging operation is done.

Question No.55:- Now you are shown articles no.16 and 17. What do you want to say about the same ?

Answer:-These are the same articles which were in the hands of Harden and Amir, which I had seen.

Question No.56:- What happened thereafter ?

Answer: My mother came towards me and took me to bedroom which is in the opposite of kitchen.

Question No.57:- What you saw when you were taken from one bedroom to another bedroom?

Answer: I saw Harun concealed himself in the toilet and Samir went in the kitchen.

Question No.58:-What did you do ?

Answer: I made inquiries with my mother, why my father is raising hue and cry. At that time my mother said they are beating brother-in-law of Harun and if I did not keep mum, she will beat me also.

Question No.59:-What happened thereafter ?

Answer: I asked my mother to bring my sleeping brother and keep him with me, and my mother did accordingly, and both of us slept and my mother locked from outside.

Question No.60:-When you woke up on 27.7.1995?

Answer: I got up at 7.00 a.m.

Question No.61:-What did you do thereafter?

Answer: The door was latched from outside, hence, I knocked

Question No.62:- Who opened the door and what happened thereafter?

Answer: My mother opened the door and I came out.

Question No.63:- What happened thereafter ?

Answer: I made inquiries with my mother who was raising hue and cry in the night. Thereupon my mother threatened me to keep mum and not to say anything about the same to anybody.

Question No.64:-Then what did you do?

Answer: I made inquries with my mother that where the mattress on the cot is? There upon mymmy replied that, there was rain in the night, hence the mattress was wet hence, it has been sent for repairs.

Question No.65:- What anything else did you see?

Answer: I saw that there were some blood stains on the wall. I also saw that the flooring was wet.

Question No.66:-Where did you see this ?

Answer: I saw blood-stains on the wall in the bedroom which is adjecent to the kitchen.

Question No.67:-Who else was there in the house in the morning ?

Answer: Arun was also present in the house in the morning.

Question No.68:-What happened thereafter ?

Answer: Harun uncle said let us go for an outing.

Question No.76:-What happened there after ?

Answer: Then we proceeded back to our home by Maruti van. On way my mother asked the driver that if he is free in the night he should come with his van to her house as she expects that she is required to go to Bhiwandi.

Question No.79:-What did you do there ?

Answer: I myself and Mubaris visited a fish acquarium and purchased some decorative stones for home acquarium for keeping in the home acquarium and came back home.

Question No.83:-What happened thereafter ?

Answer: Thereafter we proceeded by Maruti Van and on the way we stopped again at Kausa and visited

a fish acquarium and there I purchased a decorative piece.

Question No.86:- What happened thereafter?

Answer: Harun and my brother Mubaris slept on one bed in the bedroom which is opposite to the kitchen . My mother and Nilofar slept on another bed in the same bedroom.

Question No.94:-What happened thereafter ?

Answer: Thereafter my mother asked us to go and sleep in the bedroom. She also asked Harun and Samir to sleep in the adjecent bedroom as she was afraid.

Question No.95:-What happenedthereafter ?

Answer: I myself and my brother went to sleep in the bedroom adjecent to kitchen. There was no mattress and we slept on a chaddar upon the cot.

Question No.97:-What happened on 28.7.1995, in the morning?

Answer: In the morning at about 6.00 a.m. my mother informed that she will go and dial Farukh uncle at Bhiwandi and she asked us to stay there only and she left.

Question No.98:- When she came back ?

Answer: She came back after half an hour.

Question No.99:- What happened thereafter ?

Answer: I asked my mother to prepare tea, then we had tea and breakfast. When we were taking break fast she went to gallery and said to me that why people are gathered on the road, go and see.

Question No.100:-What happened thereafter ?

Answer: Myself and my brother were there, we went there and saw a dead body without clothes. people were not allowing boys like us to witness the same.

Question No.101:-What did you do thereafter ?

Answer: I made attempt and had a glimpse of the dead body and saw that the dead body was having injury to the head.

Question No.102:-What happened thereafter ?

Answer: We brothers came back towards building and saw Mummy was standing near the building and we reported that, dead body of someone is lying there.

Question No.103:-What happened thereafter ?

Answer: Thereafter my mother took me and my brother and proceeded towards an STD booth for

making a call to Farukh uncle.

Question No.104:- What happened thereafter ?

Answer: On way to STD centre, we met Nilofar. My mother asked Nilofar to go and see whose that dead body was, alongwith Mubaris. Accordingly Nilofar and Mubaris went in that direction I myself and my mother went to the STD centre.

Question No.105:- What happened there?

Answer: My mother made a phone to Faruk uncle.

Question No.106:-What she said on the telephone ?

Answer: She said that, dead body of Rahim is lying near building and he should come immediately. She also said that she had learnt about the same from children. The witness voluntarily says that, he was not knowing that the dead body was of my father and I had not informed my mother accordingly.

Question No.107:- What happened thereafter ?

Answer: Thereafter my mother made a phone to my maternal aunt at Nasik.

Question No.108:-What she said on the telephone?

Answer: She said that, she should come immediately alongwith Halim.

Question No.109:-Who is Halim ?
Answer: Halim is brother of my mother.

Question No.110:-What happened thereafter ?
Answer:We came back upto our building.

Question No.111:- What happened thereafter?
Answer: My mummy sent us upto the flat and she went to police station.

Question No.112:- What happened thereafter ?
Answer: Police arrived in our house.

Question No.113:-What happened thereafter ?
Answer : Police made inquiries about our father and took us to police station.

Question No.114:- What happened thereafter ?
Answer: In police station I learnt that the dead body which was lying near our building was of our father and he was murdered.

Question No.115:- What did you leant further ?
Answer: I learnt that, the said murder has been committed by my mother, Harun and Samir togehter.

Question No.116:- Who is accused no.1?

Answer: She is my mother.

Question No.117:- Whether Harun uncle is present in the Court?

Answer: Yes, he is present, I identify him.

Question No.121:-Whether you had seen him after the incident?

Answer: No

Question No.184:- Is it correct to say that you had not stated before police answer to question no.54 i.e. you saw Harun and Samir were beating your father and your mother was with them, at that time Harun and Samir were carrying steel bars in their hands by which digging operation is done ?

Answer : I do not remember whether I had reported as such to police or not.

Question No.185:- You had not reported to police as such and you had not reported as such because no such incident had taken place and what do you want to say about the same ?
(The Advocate was asked to put the question by splitting the question accordingly he questioned.)

Answer: It is not correct to say that I had stated

as such because the incident had not taken place. Witness volunteers that as his mother had asked him not to say anything also about the incident to outsiders.

Question No.215:- Is it correct to say that a person from bed room in the fish tank unable to see a person in the bed room which is opposite to kitchen ?

Answer: Yes.

5. There was no other witness to support or to corroborate the testimony of (p.w.2) Mohamed Musaib, minor. All other witnesses are only corroborating other circumstances of the prosecution. We have noted that during the trial this minor, came in the Court with uncle named Sami. During the recess the custody of this witness was with the Advocate, as well as the said uncle. It appears that this witness was under the influence of his uncle Sami. (P.W.2) Mohammed in his statement under Section 162 of Code of Criminal Procedure, made during the investigation stated that the accused no.2 and accused no.3 were seen hiding themselves in toilet and kitchen. But during his testimony in the Court he has improved a lot and deposed more than what he had narrated in his statement. At the time of making statement, this witness has no where stated that accused no. 2 and 3 had assaulted his father. In question no.54 as

referred above he has deposed that he saw Harun and Samir were beating his father with steel bars and his mother was with them. While answer question no.55 he has deposed that he had seen the same articles which were in the hands of Harun and Samir. The articles 16 and 17 were not the iron bars but those articles are crow-bars. This witness thereafter has deposed that he saw Harun concealing himself in the toilet and Samir went in the kitchen. We have noted that if this boy had seen the actual assault by accused no.2 and 3 in presence of accused no.1 his inquiries with the mother about the father raising hue and cry and then believing the answer of Appellant no.1 were quite unnatural. In his statement before the police he had no where mentioned about the blood stains on the wall in the bed room which was adjecent to the kitchen. But in his testimony for the first time he has referred about the said blood stains in answer to question no.65 and 66. This witness later on along with the accused no.2 and 3 in the Maruti van had visited various places. But there was no mention about the incident to these persons or to any other person. It was quite unnatural that after seeing these accused nos.2 and 3 who were beating his father with iron rods and there were blood stains in the room still, made no enquiries or informed no one about the assault. On the contrary he himself went along with these accused nos.2 and 3 happily. This witness has also in his cross examination admitted that his

mother’s relation with uncle Sami along with whom this witness was visiting Court was not good.

6. This witness has also deposed in answer to the question no.215 that a person from the bedroom, cannot see anything in the bedroom which is opposite to the kitchen. Therefore, it is also doubtful whether this witness had seen any incident as stated for the first time in his examination-in-chief before the Court. This witness has no where referred and made any statement against appellant no.1/accused no.1, his mother at about any assault or attach, at any point of time. This witness had named accused nos.2 and 3 for the first time in the Court. Therefore, this contradiction or improvement indicating specific assault by the accused nos.2 and 3, goes to the root of the matter. Such testimony in view of such contradiction, cannot be the foundation for conviction against accused nos.2 and 3, in the present facts and circumstances of the case. According to us this witness appears to be tutored witness, and inspires no confidence. The evidence of this witness therefore, after evaluation from the various angle cannot be the foundation to maintain the order of conviction. Even if there is some truth in his evidence, but still for want of other corroboration or linking evidence in respect of the actual assaults by these two appellants i.e. accused nos2 and 3, this contradiction and improvement raises various doubts in the prosecution

case and therefore, it cannot be said that these accused nos.2 and 3 had actually assaulted the deceased, with the help of accused no.1. No other independent eye witness including one Shabana, was examined in support of their prosecution case. Therefore, the reliance on the single solitary testimony of p.w. no.2 Mohammed, and conviction based on the same, inspite of omissions, exaggerations and contradictions is not correct. The testimony of this witness is therefore, shaky.

7. Excluding this, there is nothing which supports the prosecution case and/or there are any other clinching evidence on record to pin point that accused have committed the murder in question.

8. Other circumstantial materials which were taken into consideration while convicting all the accused, are bad character of accused no.1, motive, preparation and other circumstantial evidence through other witnesses. Apart from the testimony of Mohammed Musaib (p.w. 2), p.w.8 Mohammed Samir, p.w. 9 Mohamed Farooq, p.w.10 Izaz and p.w.13 Khursheed have been examined to support the story of illicit relation of accused no.1 with the accused no.2. Even if, assumed for a moment that accused no.1 had some bad elements but that itself cannot be the foundation to convict any person. There is nothing specific on the record except these, conjunctures and speculative

allegations. The preparation of the crime as contended, also no where supports the prosecution case. The purchase of those plastic sheets and gunny bag and later on alleged recovery, and these materials, itself cannot be related or circumstantial evidence to support the prosecution case, that all these accused had pre-planned for murder and accordingly, committed the crime and disposed of the evidence of the crime by throwing the dead body of the deceased near Vijay farm and or by cleaning and washing the place of incident.

9. P.W.4, Kantilal Jain, was unable to support the prosecution case for want of test identification parade of the appellant no.2 who alleged to have purchased the crowbars from this witness. Therefore, the purchase of crowbars by the appellant no.2 from p.w. 4 remains unestablished therefore, it does not link with the circumstantial evidence of the prosecution case. So also the testimony of Kisan p.w. 14. The learned Judge in fact not relied on the p.w. 14 Kisan who had identified the crowbars, articles 17 and 18.

10. The testimony of Dilip Chauhan, p.w. 19 to whom accused nos.2 and accused no.3 had disclosed their plan to kill one person by showing those weapons. This witness has also no where supported the story of preparation of conspiracy, because of various

omissions and improvements made by the witness. Specially because of contradiction in and with the testimony of Mohammed Musaib p.w. no.2., P.W.5 Babulal from whom the accused no.2 had purchased 13 feet plastic sheets on 27.7.1995, in absence of test identification parade is also unreliable and quite shaky. The same is the case with p.w. no.15 Shaikh Ansari, who alleged to had given knives to accused no.2. The purchase of the gunny bags by the accused no.2 in absence of test identification parade, identification by this witness to the accused in the Court is also shaky. Any way these purchases in absence of material evidence to corroborate the prosecution case through p.w. no.2, independently no way supports the prosecution to convict all the accused for the charges of murder. The testimony of p.w. no.20 of one Izaz Ahmed also no way supports the prosecution case except to the fact that the accused nos.1 and 2 Mohammed Musaib with his brother travelled and made purchases on 27.7.1995.

11. The recovery of blood stained clothes and two pieces of crow bars in absence of endorsement signature or thumb impression of the accused no.2 is also doubtful. Therefore testimony of the Investigating Officer is difficult to rely in the circumstances to convict the accused. The panch witness Husain p.w. 16 had not admitted the entire recital from the memorandum of the statement of

accused. He had in fact half heartedly supported the prosecution case.

12. As p.w. 12 Abdul Shaikh was declared hostile and the prosecution case about the existence of blood stains on the wall on scene of offence is also not corroborated and supported by any other evidence. The blood stained articles, and clothes were also sent to the Chemical Analyser, after eleven days of the incident by a letter dated 7.8.1995. There was no sufficient reason made out for such delay. Therefore reliance on those recoveries of articles and clothes to convict the accused is also not correct.

13. The law is clear that if the case is made out, a single eye witness is sufficient to support the prosecution case and order of conviction can be passed. But in this case, where a child eye witness and his testimony, which is full of material omissions, exaggerations and contradictions, then conviction as based on such shaky witness, even though interested or related, still raises various doubts in the prosecution story. In absence of any corroborative or independent witness it is difficult to place reliance on such tutored or brought up witness to convict a person under Section 302 of Indian Penal Code. After going through the whole testimony we are of the view that the testimony of this witness is unreliable. He appears to be tutored

witness. His general behaviour with mother was quite unnatural. As noted he as per directions of his mother went to the spot where dead body was found near Vijay poultry farm, but he could not identify his own father and accordingly reported his mother, inspite of the fact that in the crowd, on the spot, he could able to see the face and head injuries of the dead body. The testimony of Mohammed Musaib is not natural and acceptable and cannot be relied upon to convict the accused.

14. The reliance is also placed on the letter alleged to have been written by accused no.1, addressed to p.w.8, from jail, in Urdu whereby she had expressed her repentance and prayed for pardon. The evidence of p.w. 8, 13, 26, 27 and 29 have been relied to support the same. However, the complainant (accused no.1) as well as, the testimony of other witnesses no where supports the basic contents of the said letter also,. It is not placed on the record, under what circumstances and for what reason, such letter was written and sent from the jail by accused no.1.

15. The so-called confession statement of accused no.1 before the police p.w. 25 as reflected in F.I.R. has been treated as confession and used against the accused no.1 to prove the guilt of all the accused. It is difficult to accept the Exh-25 as a whole and

sole documents and or statements for the conviction. The F.I.R. was lodged on 28.7.1995 at 10.00 a.m. whereas, incident as per the prosecution, took place after the midnight of 27.7.1995 or during the early morning of 28.7.1995. There is no evidence to connect that all the accused, after assault had used the plastic sheets and gunny bag and thrown the body of the deceased near Vijay Poultry farm. The contention of the accused no.1 in complaint exh-25 read with her own letter in Urdu and her statement under Section 313 of Code of Criminal Procedure, apart from other evidence, no where supports the prosecution case as they sought to be proved through these witnesses.

16. There are no allegations basically against accused no.3 in so far as illicit relations with accused no.1 as contended against accused no.2. Therefore, the motive of accused no.3 to kill the deceased, only because he is a friend of accused no.2, also raises various doubts. The recovery of the incriminating articles, choppers, mattress pieces (p.w.24) from public place also create uncertainities about the prosecution case. P.w.18 has stated that the complainant, accused no.1, had identified the body at about 12.00 p.m., on 28.7.1995, whereas, the complaint was lodged on 28.7.1995 at 10.00 a.m. itself. Accused no.1 was not arrested immediately. The evidence of p.w.8 has been used to prove the the antecedents of the bad character of accused no.1

without any further material on the record. As observed already, that itself cannot be relied to connect all the accused with the present crime. The accused no.1 was no where involved during the day time wherein the accused nos.2 and 3 had alleged to have purchased the alleged incriminating articles.

17. As per the complaint accused no.1 has stated that at about 3.00 p.m., on 28.7.1995 as the deceased was sleeping after taking his dinner, at about 1.30 p.m., accused no.2 Harun with chopper along with two others with chopper and crowbar entered the house and they assaulted her husband, and the dead body was taken out. Before that she had taken her sons to the next room. Later on They found the body at about 9.00 a.m. on the same day. The said self incriminating complaint or F.I.R. before the police also raises various doubts.

18. The prosecution has failed to prove that all the accused with common intention and conspiracy had assaulted the deceased and the same was witnessed by p.w. no.2 Mohammed Musaib, 27.7.1995. The next day events also no where supports the prosecution case of preparation and destroying the evidence of the murder or crime in question, by throwing the dead body in the plastic scrap/bag and/or gunny bag near the Vijay farm and also by washing and destroying the evidence in the room of incident in question, by all the accused. The

prosecution has also not proved the recoveries of the weapons as well as clothes and/or the spot of incidence with blood stains on the wall as contended. Cumulative effect of all these raises various doubts and therefore, in view of the doubts we are not inclined to maintain the order of conviction.

C O N C L U S I O N :

19. For the reasons incorporated above we are of the view that there is force in the contentions raised by the appellants/accused, there is merit in the appeal. We accordingly allow both the appeals and the judgment and order dated 30th April, 1998 passed by the Additional Sessions Judge, Thane in Sessions Case No.92 of 1996 is quashed and set aside. The appellants are directed to be released forthwith, if not required in any other offence.

20. Both the appeals are allowed.

(V.G.PALSHIKAR,J.)

(ANOOP V. MOHTA, J.)

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIM. APPEAL NO.517 OF 1998
WITH
CRIM. APPEAL NO.709 OF 1998

Office Notes,Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's orders

Mr.S.V.Marwadi Advocate for Appellants.
Mrs. P.H.Kantharia, A.P.P. for Respondents

CORAM: V.G. PALSHIKAR &
ANOOP V. MOHTA, JJ.
DATED: 3RD NOVEMBER, 2004.

P.C.

. For the reasons seperately recorded, following order is passed.

. We accordingly allow both the appeals and the judgment and order dated 30th April, 1998 passed by the Additional Sessions Judge, Thane in Sessions Case No.92 of 1996 is quashed and set aside. The appellants are directed to be released

forthwith, if not required in any other offence.

. Both the appeals are allowed.

(V.G.PALSHIKAR,J.)

(ANOOP V. MOHTA,J.)